MOHD DAUD MAHMOD

v.

SURUHANJAYA PERKHIDMATAN AWAM, MALAYSIA & ANOR

COURT OF APPEAL, PUTRAJAYA
ZALEHA ZAHARI JCA
HASAN LAH JCA
SULAIMAN DAUD JCA
[CIVIL APPEAL NO: W-01-80-01]
8 JANUARY 2009

ADMINISTRATIVE LAW: *Dismissal from service - Disciplinary proceedings - Letter communicating decision to dismiss contradicted earlier show cause letter - Whether disciplinary proceedings rendered flawed*

ADMINISTRATIVE LAW: *Dismissal from service - Disciplinary proceedings - Whether infringement of GO 23 of Public Officers (Conduct and Discipline) (Chapter "D") General Orders 1980 - Whether opportunity to mitigate given - Whether reasons for dismissal should be made known*

The appellant was dismissed from public service and commenced proceedings in the High Court for a declaration that his dismissal from service was null and void. In the High Court the appellant argued, *inter alia*, an alleged infringement of GO 23 of the Public Officers (Conduct and Discipline) (Chapter "D") General Orders 1980 ('General Orders'), that he was not given an opportunity to mitigate before punishment was imposed on him and that the decision to dismiss him was invalid for failure to give reasons. The High Court judge dismissed the appellant's claim. On appeal before the Court of Appeal, the appellant was granted leave to raise a new issue, *ie*, that the decision-making process at the end of the ultimate end of the proceedings was fatally flawed. That was because the words "atau turun pangkat" in the respondents' earlier show cause letter to the appellant were absent in the respondents' subsequent letter communicating their decision to dismiss him. As such, it was argued that the respondents did not adequately apply their minds in the decision-making process at the ultimate end of the proceedings rendering the whole proceedings flawed.

Held (dismissing the appeal)
Per Zaleha Zahari JCA delivering the judgment of the court:

(1) On the facts it was clear that the respondents did comply with GO 23 and GO 26 of the General Orders and that the rule of natural justice was complied with. By issuing the show cause letter to the appellant, the respondents clearly gave the appellant an opportunity to state his case and make his representations. Also, by the holding of an oral enquiry, it was abundantly clear that the appellant was given the fullest opportunity of being heard. The respondents' decision at the conclusion of the enquiry was that the appellant's explanation did not exculpate him. (para 7)

(2) The High Court judge was right in ruling based on the authorities that there was no separate right to make representations before punishment was meted out against the appellant. No injustice was occasioned by not giving the appellant an opportunity to mitigate before punishment was imposed. The disciplinary board was not even required to make a finding of guilt and was not required to give reasons. (para 8)

(3) The express cross reference in the subsequent letter to the earlier show cause letter meant that the respondents were fully cognizant of the fact that the disciplinary proceedings instituted against the appellant were with a view to dismissal or reduction in rank. It was open to the respondents to impose either one of two punishments should they find the misconduct alleged against the appellant proven. On the facts and circumstances of the case, the disciplinary authority considered the more serious punishment to be more appropriate. The omission to state expressly the words "atau turun pangkat" in the subsequent letter did not vitiate the proceedings. The decision-making process up to the ultimate end of the proceedings was valid and of full legal effect. (para 11)

Bahasa Malaysia *Translation Of Headnotes*

Perayu telah dibuang kerja dari perkhidmatan am dan telah memulakan prosiding di Mahkamah Tinggi bagi memohon deklarasi bahawa pembuangan kerjanya adalah tak sah dan batal. Di Mahkamah Tinggi perayu antara lain mengutarakan hujah tentang

ketidakpatuhan PA 23 Perintah-Perintah Am (Kelakuan dan Tatatertib) (Bab D) 1980 ('Perintah Am'), bahawa beliau tidak diberi peluang untuk memohon keringanan hukuman sebelum hukuman dijatuhkan dan bahawa keputusan untuk membuang kerjanya tak sah kerana kegagalan memberi sebab-sebab baginya. Hakim Mahkamah Tinggi bagaimanapun menolak tuntutan perayu. Di rayuan di hadapan Mahkamah Rayuan, perayu telah diberi kebenaran untuk membangkitkan satu isu baru, iaitu bahawa proses membuat keputusan di akhir prosiding terakhir adalah cacat dengan cara yang memudaratkan. Ianya disebabkan perkataan "atau turun pangkat" yang wujud dalam surat tunjuk sebab terdahulu responden-responden telah tidak wujud pada surat terkemudian responden-responden yang menyampaikan keputusan membuang kerja perayu. Akibatnya perayu berhujah bahawa responden-responden tidak menggunakan akal budinya di dalam proses membuat keputusan di peringkat terakhir prosiding sekaligus menjadikan keseluruhan prosiding cacat.

Diputuskan (menolak rayuan)
Oleh Zaleha Zahari HMR menyampaikan penghakiman mahkamah:

(1) Berdasarkan fakta, responden-responden jelas telah mematuhi PA 23 dan PA 26 Perintah Am dan juga kaedah-kaedah am keadilan asasi. Dengan mengeluarkan surat tunjuk sebab kepada perayu, responden-responden jelas memberikan peluang kepada perayu untuk menyatakan kesnya dan membuat representasinya. Selain itu, dengan mengadakan penyiasatan lisan, jelas bahawa perayu telah diberi seluas-luas peluang untuk didengar. Keputusan responden-responen di akhir penyiasatan adalah bahawa penjelasan perayu gagal untuk melepaskannya.

(2) Hakim Mahkamah Tinggi betul dalam membuat keputusan berdasarkan autoriti-autoriti bahawa tidak wujud hak berasingan untuk membuat representasi sebelum hukuman dijatuhkan terhadap perayu. Maka tiada ketidakadilan berlaku kerana kegagalan memberi peluang kepada perayu untuk membuat mitigasi sebelum hukuman dijatuhkan. Lembaga disiplin juga tidak dikehendaki untuk membuat dapatan bersalah dan tidak dikehendaki untuk memberikan alasan-alasan.

A **(3)** Rujukan silang secara expres di dalam surat terkemudian kepada surat tunjuk sebab terdahulu bermakna bahawa responden-responden amat sedar dan akur akan fakta bahawa prosiding disiplin yang dikenakan terhadap perayu adalah dengan tujuan untuk membuang kerja atau turun pangkat.
B Ianya terbuka kepada responden-responden untuk menjatuhkan mana satu dari dua hukuman tersebut jika mereka dapati tuduhan salahlaku terhadap perayu dibuktikan. Berdasarkan fakta dan halkeadaan kes, pihakberkuasa disiplin telah memutuskan hukuman yang lebih berat sebagai lebih sesuai.
C Kegagalan untuk menyatakan secara ekspres perkataan "atau turun pangkat" dalam surat terkemudian langsung tidak menjejaskan prosiding. Maka proses membuat keputusan hingga ke bahagian terakhir prosiding adalah sah dan berkesan sepenuhnya di sisi undang-undang.

D

Case(s) referred to:

Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal [2001] 2 CLJ 525 FC ***(refd)***

Legislation referred to:

E Federal Constitution, art. 135(2)

Public Officers (Conduct and Discipline) (Chapter "D") General Orders 1980, GO 23, 26(5)

For the appellant - Karpal Singh (Sangeet Kaur with him); M/s Karpal Singh & Co

F *For the respondents - Narkunavachy Sundareson SFC (Cik Azlina Mahmood SFC with her)*

[Appeal from High Court, Kuala Lumpur; Suit No: S2-21-152-1996]

G *Reported by Usha Thiagarajah*

JUDGMENT

H **Zaleha Zahari JCA:**

[1] This is an appeal against the decision of the High Court Kuala Lumpur dated 29 August 2001 dismissing the plaintiff's (appellant before us) claim with costs. On 25 September 2008 we dismissed the appeal with costs. Our reasons are as follows.

I

Background

[2] The appellant was at the material time an officer attached to the Cultural, Arts & Tourism Centre, Wilayah Timur, Kota Bharu, Kelantan. By a Show Cause letter dated 22 March 1993, bearing the heading "Kenyataan Alasan-Alasan Buang Kerja atau Turun Pangkat", the plaintiff was informed that based on a report received, pursuant to the General Order 26 of the Public Officers (Conduct and Discipline) (Chapter "D") General Orders 1980, the defendants (respondents before us) had decided that disciplinary action with a view to dismissal or reduction in rank should be taken against him based on six grounds, *inter alia*, absence from work without permission, leaving his workplace without permission, as well as inefficiency (being irresponsible) at work. The appellant was required to give reasons in writing as to why he should not be dismissed or reduced in rank within 21 days from the date of receipt of the letter.

[3] The appellant showed cause vide letter dated 30 April 1993. Upon receipt of the appellant's reply, pursuant to General Order 26(5) Chapter D, a Committee of Enquiry was then set up. An enquiry was held on 29 September 1993 at which enquiry the appellant attended and gave evidence.

[4] The respondents then issued a letter dated 11 November 1993 to the appellant as follows:

> Encik Mohd Daud bin Mahmod
>
> Melalui dan Salinan:
>
> Ketua Setiausaha,
> Kementerian Kebudayaan, Kesenian
> dan Pelanchongan Malaysia,
> Tingkat 34-36, Menara Dato' Onn,
> Pusat Dagangan Dunia Putra,
> 45, Jalan Tun Ismail,
> 50694 KUALA LUMPUR
>
> Tuan,
>
> Keputusan Tatatertib Suruhanjaya Perkhidmatan Awam,
>
> Saya diarah merujuk kepada surat Suruhajaya ini SPA. SULIT. 152259/3/(5) bertarikh 22.3.1993 meminta tuan mengemukakan representasi secara bertulis yang mengandungi alasan-alasan yang tuan hendak gunakan untuk membebaskan diri tuan daripada

A tindakan tatatertib dengan tujuan buang kerja di bawah Perintah Am 26, Perintah-Perintah Am Pegawai Awam (Kelakuan dan Tatatertib) (Bab 'D') 1980. Tuan telah mengemukakan representasi tersebut melalui surat tuan bertarikh 30.4.1993.

B 2. Suruhanjaya Perkhidmatan Awam dalam mesyuaratnya yang ke-1748 pada 1.11.1993 setelah menimbangkan dengan teliti kes tuan itu pada keseluruhannya telah memutuskan bahawa tuan dikenakan hukuman buang kerja berkuatkuasa dengan serta merta iaitu mulai 2.11.1993.

C **[5]** On 16 October 1996 the appellant instituted proceedings for a declaration that his dismissal from service was null and void, that he was and is still an employee in the public service, as well as consequential orders and damages.

D **[6]** In the High Court the appellant's case was argued on the pleaded issues of an alleged infringement of art. 135(2) of the Federal Constitution and General Order 23, that he was not given an opportunity to mitigate before punishment was imposed upon him, the decision was invalid for failure to give reasons.

E **[7]** On the facts of this case it was clear that the respondents had complied with GO 23 and 26 and that the rule of natural justice had been complied with. By issuing the show cause letter which the respondents did, in which letter the grounds upon which the disciplinary action was based had been set out and F where it was expressly stated that it was with a view to dismissal or reduction in rank, the appellant had clearly been given an opportunity to state his case and make his representations. The holding of an oral enquiry, at which enquiry the plaintiff was present and given an opportunity to testify, it is abundantly clear G that the appellant had been given the fullest opportunity of being heard. The respondents decision at the conclusion of the enquiry was that the appellant's explanation did not exculpate him.

[8] The High Court Judge was clearly in the circumstances of H this case right in ruling on the issues before him, based on the authorities cited in the judgment, that there was no separate right to make representations before punishment is meted out against the appellant. We agree that no injustice was occasioned by not giving the appellant an opportunity to mitigate before punishment I was imposed. The disciplinary board was not even required to make a finding of guilt and is not required to give reasons. (See *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal* [2001] 2 CLJ 525 Federal Court).

[9] On appeal before us, the appellant's counsel, Encik Karpal Singh, applied orally for leave to raise a new issue, ie, "That the "decision-making process at the ultimate end of the proceedings is fatally flawed". We granted him leave to do so. The arguments at the hearing of the appeal was confined and directed to this new issue.

[10] The appellant's counsel submission on this new issue was this. He was of the view that the absence of the words "atau Turun Pangkat" in the letter dated 11 November 1993 in communicating the respondents' decision was significant. En. Karpal submitted the absence of the words "atau Turun Pangkat" amounted to a "contradiction" of the earlier show cause letter and be construed to mean that the respondents had not adequately applied their minds in the decision making process at the ultimate end of the proceedings rendering the whole proceedings flawed.

[11] On this new issue, we are of the following view. The absence of the words "atau Turun Pangkat" in the letter communicating the respondents' decision in respect of the disciplinary proceedings instituted against the appellant cannot be construed to mean that the respondents did not adequately apply their mind at the decision making process at the ultimate end of the proceedings by reason of the express cross reference to the earlier show cause letter, where the words "reduction in rank" had been expressly mentioned. We are of the view that this express cross reference to the earlier letter must be construed to mean that the respondents were fully cognizant of the fact that the disciplinary proceedings instituted against the appellant were with a view to dismissal or reduction in rank. That it was open to the respondents to impose either one or the other of these two punishment should they find the misconduct alleged against the appellant proven. On the facts and circumstances of this case the disciplinary authority considered the more serious punishment to be more appropriate. The omission to state expressly the words "or reduction in rank" in the letter communicating the respondents' decision, in our considered opinion, does not vitiate the proceedings. The decision making process up to the ultimate end of the proceedings was in our considered opinion valid and of full legal effect.

[12] The appeal is dismissed with costs. The deposit to the respondent to account of taxed costs.